

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PATRICIA C. BARBERA,

Plaintiff,

vs.

WMC MORTGAGE CORP., a California corp.,
aka WMC DIRECT, a California business entity,
et al.,

Defendants.

Case No: C 08-02677 SBA

**ORDER GRANTING PLAINTIFF'S
MOTION FOR REMAND AND
DENYING DEFENDANTS' MOTIONS
TO DISMISS**

[Docket 14, 15, 16, 17]

The parties now are before the Court on plaintiff's motion to remand (Docket No. 14) and defendants' respective motions to dismiss (Docket 15, 16, 17). Having received, read and considered the papers filed in connection with these motions, and having reviewed the file in this action, the Court grants plaintiff's motion to remand and denies defendants' motions to dismiss as moot.

I. BACKGROUND

On April 11, 2008, plaintiff Patricia Barbera filed a pro se civil complaint in Marin County Superior Court against defendants WMC Mortgage, LLC, and GE Consumer Finance (collectively "WMC"), California Land Title Company of Marin ("California Land Title") and Select Portfolio Servicing Inc. ("Select Portfolio"). On May 28, 2008, defendant WMC removed the action to this Court on the ground that certain of plaintiff's claims arise under federal law. 28 U.S.C. § 1331. On the same date, Select Portfolio filed a demurrer in the Superior Court. (Docket 15-5, Shakibi Decl. ¶ 5.) Neither Select Portfolio nor California Land Title joined in the removal. However, Select Portfolio and California Land Title subsequently filed joinders on June 9, 2008 and July 15, 2008, respectively. (Docket 12, 36.)

1 On June 13, 2008, plaintiff filed a “Notice of Wrongful Removal and Motion for Remand
2 and Vacate Pursuant to 28 U.S.C. § 1332(c)(1) and 1447(c) and Fed.R.Civ.P 55,” in which she
3 seeks to remand the action on various grounds, including WMC’s failure to join all parties in the
4 removal. (Docket 14.) Subsequently, all defendants filed their own motions to dismiss under Rule
5 12(b).

6 **II. DISCUSSION**

7 Under 28 U.S.C. § 1441, a defendant may remove a civil action brought in a state court to
8 federal district court if the district court has original jurisdiction. Abrego Abrego v. The Dow
9 Chemical Co., 443 F.3d 676, 679 (9th Cir. 2006). A defendant seeking to remove an action must
10 do within 30 days of having received the complaint. 28 U.S.C. § 1446(b). Where there are
11 multiple defendants, the rule of “unanimity” requires that all defendants must join in the removal.
12 See United Computer Sys., Inc. v. AT & T Corp., 298 F.3d 756, 762 (9th Cir. 2002); Hewitt v. City
13 of Stanton, 798 F.2d 1230, 1232-33 (9th Cir. 1986); Schwarzer, Tashima, Wagstaffe, Federal Civil
14 Procedure Before Trial, § 2.611 at 2D1.2 (TRG 2008) (citing cases).

15 A motion to remand is the proper procedure for challenging removal. Remand may be
16 ordered for either lack of subject matter jurisdiction or any defect in the removal procedure. See 28
17 U.S.C. § 1447(c). “Removal statutes are strictly construed against removal.” Libhart v. Santa
18 Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir.1979). “[D]oubts about removal must be resolved
19 in favor of remand.” Osborn v. Metropolitan Life Ins. Co., 341 F. Supp. 2d 1123, 1126 (E.D. Cal.
20 2004); Boggs v. Lewis, 863 F.2d 662, 663 (9th Cir. 1998). The failure to timely join all defendants
21 is grounds for remand. Prize Frize, Inc. v. Matrix (U.S.) Inc., 167 F.3d 1261, 1266 (9th Cir. 1999)
22 (belated attempt by defendant to join in removal after 30-day removal period had lapsed was
23 insufficient to prevent remand), overruled on other grounds by Abrego Abrego v. The Dow
24 Chemical Co., 443 F.3d 676, 681 (9th Cir. 2006).

25 Here, plaintiff argues that remand is appropriate on the ground WMC failed to join all
26 defendants in the removal. The Court agrees. WMC acknowledges its failure to join the other
27 defendants, but argues that it was unaware that any of the other defendants had been served.
28 (Docket 34, WMC’s Opp. at 1.) However, the obligation to join all defendants is based on whether

1 the defendant actually has been served, not on the subjective knowledge of the removing party.¹
2 See Beltran v. Monterey County, 2009 WL 585880 at *2 (N.D. Cal. 2009) (“[a] removing
3 defendant must exercise due diligence to ascertain if other defendants have been served, and
4 simply checking if a proof of service has been filed with the court is insufficient.”) (citation
5 omitted). Moreover, Select Portfolio indeed had already had received the complaint, as evidenced
6 the fact that it filed a demurrer in state court on the same date that WMC filed its notice of
7 removal. (Shakibi Decl. ¶ 5.)


8 Even if the court were to consider Select Portfolio’s post-removal joinder filed on June 9,
9 2008 (Docket 12), remand nonetheless is proper because California Land Title failed to timely join
10 in the removal. WMC filed its notice of removal on May 28, 2008. However, California Land
11 Title did not file its joinder until July 15, 2008, well after the statutory 30-day removal period had
12 run. (Docket No. 36.) Though it is not clear precisely when California Land Title was served, the
13 record confirms that it was in receipt of the complaint at the very latest on June 3, 2008, when it
14 sought leave of Court for additional time to respond to the Complaint. (Docket 8.) As such,
15 California Land Title’s joinder filed on July 15, 2008 is well outside the 30-day window to seek
16 removal. E.g., Prize Frize, 167 F.3d at 1266.

17 IV. CONCLUSION

18 The Court concludes that the removal was defective on the ground that all defendants failed
19 to timely join in the removal. Accordingly,

20 IT IS HEREBY ORDERED THAT plaintiff’s motion to remand (Docket 14) is GRANTED
21 and this action is REMANDED to the Marin County Superior Court. The Court does not reach the
22 merits of defendants’ motions to dismiss (Docket 15, 16, 17) which are DENIED as moot.

23
24 Dated: March 18, 2009


25 Hon. Saundra Brown Armstrong
26 United States District Judge

27 ¹ WMC’s citation to Salveson v. Western States Bankcard Ass’n, 731 F.2d 1423, 1429 (9th
28 Cir. 1984) is inapposite. Salveson holds that an unserved party need not be joined in a notice of
removal. In this case, however, Select Portfolio had, in fact, been served at the time of removal.

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2 FOR THE
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4 BARBERA et al,

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7 WMC MORTGAGE CORPORATION et al,

8 Defendant.
9 _____/

Case Number: CV08-02677 SBA

10 **CERTIFICATE OF SERVICE**

11
12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
13 Court, Northern District of California.

14 That on March 18, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
16 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
17 located in the Clerk's office.

18 Patricia C. Barbera
19 24 Caribe Isle
20 Novato, CA 94949

21 Dated: March 18, 2009

Richard W. Wieking, Clerk

22 By: LISA R CLARK, Deputy Clerk
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